03-0098

SUPREME COURT OF WISCONSIN

Tatum Smaxwell, a minor, Tanya Smaxwell and
Greg Smaxwell,
Plaintiffs-Appellants-Petitioners,

v. Appeal No. 03-0098

Melva Bayard, Manitowoc County and
Employers Health Insurance Company,
Defendants,
Gloria Thompson and Heritage Mutual
Insurance Company,
Defendants-Respondents.

PETITIONER'S BRIEF AND APPENDIX

On appeal from the Circuit Court for Manitowoc County
Case No. 01-CV-246
The Honorable Patrick L. Willis, presiding

Submitted by:
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STATEMENT OF THE ISSUE

Whether a landowner may be liable on common law negligence grounds for injuries caused on the landowner's property by a known dangerous dog not owned by the landowner.

Answered by the trial court: No.

Answered by the court of appeals: No.

STATEMENT ON ORAL ARGUMENT

Petitioner requests oral argument on the issue before the Court.

STATEMENT OF THE CASE

Procedural History

This is an appeal from the final Judgment, entered on November 27, 2002, in the Circuit Court for Manitowoc County, the Honorable Patrick L. Willis presiding, granting summary judgment dismissal of plaintiffs claims against defendants Gloria Thompson and Heritage Mutual Insurance Company. (A. p. 2 ¶1)

The action involves claims by the plaintiffs Greg and Tanya Smaxwell for injuries sustained on June 15, 1999, by their daughter Tatum, age three at the time, when she was attacked by three dogs owned by Melva Bayard. The attack occurred on property owned by defendant Gloria Thompson. Heritage Mutual Insurance Company was Thompson's liability insurer. Prior to the incident, the Manitowoc County Sheriff's Department had received several complaints concerning Bayard's dogs running at large and Thompson was aware of this history. Plaintiffs brought claims against Bayard for strict liability pursuant to Wis. Stat. §174.02, and against Thompson, Heritage, and Manitowoc County for negligence. (A. p. 4 ¶6)

Bayard did not respond to the summons and complaint and has not appeared in the case. The County, Thompson, and her insurer denied liability and moved for summary judgment. The trial court granted these motions, concluding in part that "Thompson's conduct, even if negligent,

cannot form the basis for liability under the current state of the law in Wisconsin." (A. p. 22) The Smaxwells appealed the trial court's dismissal of their claims against Thompson and Heritage.

The court of appeals affirmed the trial court. In its decision the court of appeals stated that "the facts at hand are remarkably similar to those of Gonzales v. Wilkinson, 68 Wis. 2d 154, 227 N.W.2d 907 (1975) and Malone v. Fons, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998)." (A. p. 5 ¶9) The court of appeals rejected the Smaxwell's arguments that Gonzales and Malone were distinguishable from the instant case and concluded that "Thompson, as a landlord, cannot be held liable under common law negligence grounds for the acts of her tenant Bayard's dogs." (A. p. 8 ¶16)

Factual Summary

The facts in the record were largely undisputed and were accurately summarized by the trial court in its decision as follows:[1]

> At all relevant times Gloria Thompson owned two parcels of property located on County Trunk Highway CR in Manitowoc County. The larger of the two parcels, consisting of 2.91 acres, included Gloria Thompson's residence as well

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1 The factual summary is quoted from the trial court's decision attached hereto in the Appendix at pages 12-14.

as a former motel property which had been converted into apartments. Three of the apartment units were occupied in June of 1999. Melva Bayard and Richard Hines rented one of the apartment units. Gloria Thompson's daughter, Tanya Smaxwell, lived in another of the units with her children Darion, Tatum, and Jayme. Nicole Klein, another of Gloria Thompson's daughters, occupied a third apartment with her children Nick and Rochelle.

Gloria Thompson owned a second smaller parcel of real estate located behind the 2.91 acre parcel. Although she did not charge any additional rent, Gloria Thompson had permitted Melva Bayard to house some of her dogs on this smaller parcel since the early 1990s. Thompson did not know the number of dogs Bayard kept on the property, but was aware that there were a number of dogs, including wolf hybrids. Thompson was also aware that law enforcement personnel had made several visits to Ms. Bayard concerning her dogs and that one of the dogs had bitten a police officer. Thompson herself apparently received a citation regarding the dogs in 1996, though the facts presented to the court give no indication as to what happened as a result of the citation being

issued. Thompson took no active role in caring for the dogs and apparently had not even viewed the conditions under which the dogs were house since the mid-1990s.

It is undisputed that there was a long history of complaints from neighbors to the Manitowoc County Sheriff's Department regarding Melva Bayard's dogs prior to the attack on Tatum Smaxwell and that Thompson was aware of many complaints. The complaints go back to 1992 and total more than 70 in number. Without itemizing them here, the majority of the complaints are for the dogs running at large. In a number of complaints neighbors express fear based on wolf hybrid-looking dogs being allowed to run at large. A report from August 29, 1992 indicates a sheriff's officer was bitten by a German Shephard dog owned by Ms. Bayard. In a December, 1995 complaint the caller indicated that the animals have killed his pigeons in the past. In 1999 Melva Bayard admitted that some of her own puppies had been killed. Other complaints report that various wolf hybrid dogs were threatening and vicious, but there appear to be no other specific complaints involving an actual attack by any of Melva Bayard's dogs on a person or another animal.

On the morning of June 15, 1999 Tanya Smaxwell was visiting Gloria Thompson at Thompson's house. Tanya had her 3-year-old daughter Tatum and her infant son Jayme with her. Thompson's other adult daughter, Nicole Klein, and her children were also present. As the three adults were preparing coffee to drink on the porch, Tatum was allowed to go outside with her 5-year-old cousin, Nick, who offered to watch her. Before the adults got outside with their coffee, Nick came running back in the house, screaming that the dogs had gotten Tatum. Three of Melva Bayard's wolf hybrid dogs, each weighing approximately 75 pounds, were on top of Tatum attacking her. Gloria and Tanya succeeded in getting Tatum away from the dogs, but not before Tatum sustained serious injury. The dogs were able to get loose because Bayard forgot to close the latch to their kennel the night before.

ARGUMENT

Summary of Argument

Dog ownership should not be the sole factor determining liability in all dog bite cases in the State of Wisconsin. Landowners must use ordinary care to maintain their property to avoid exposing their guests to an unreasonable risk of harm. In the present case, Gloria Thompson permitted

the presence of dangerous dogs/wolf-hybrids on her property, and was aware that these animals had a tendency to run loose. Yet Thompson took no action to ensure that the animals were properly confined or otherwise protect her guests from the danger posed by the animals. Under the circumstances, applying common law negligence principles, a reasonable jury could easily conclude that Thompson did not exercise ordinary care under the circumstances.

The lower courts both concluded that a landlord cannot be liable on common law negligence grounds for the acts of a tenant's dog based on Gonzales v. Wilkinson, 68 Wis. 2d 154, 227 N.W.2d 907 (1975) and Malone v. Fons, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998). Such a conclusion is not necessary because Gonzales was an attractive nuisance case that was decided before the Wisconsin Supreme Court abrogated the common law immunities previously enjoyed by land owners, and the dog bite attack in Malone didn't even occur on the landlord's property. Thus, the defendants in Gonzales and Malone may not have been liable under the Smaxwells' theory in the present case.

The interpretation of Gonzales that has been adopted by the Court of Appeals in Malone and the lower courts in the present case essentially creates a rule of immunity for all others who are not owners or keepers in dog bite cases. By taking the negligence decision away from the jury in this

case the trial court was really making a premature policy decision. Pursuant to Alvarado v. Sersch, 2003 WI 55, 662 N.W.2d 350, 262 Wis. 2d 74, as in most cases, public policy does not compel a finding of non-liability as a matter of law without first allowing the jury to decide the issue of negligence. Therefore, the Smaxwells' request that the Court reverse the Court of Appeals and remand the matter for trial on the Smaxwells' negligence claims against Gloria Thompson and Heritage Mutual Insurance Company.

Summary Judgment Standard

This is a *de novo* review. Wis. Stats. § 802.08 provides that summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment should not be granted if reasonable persons could reach different inferences from the undisputed facts. Delmore v. American Family Mutual Insurance Co., 118 Wis. 2d 510, 516, 348 N.W.2d 151 (1984). Summary judgment is appropriate only if the inferences that can reasonably be drawn from the facts are not doubtful and lead to the sole conclusion that the moving party must prevail. Radlein v. Industrial Fire and Casualty Insurance Co., 117 Wis. 2d 605, 609, 345 N.W.2d 874 (1984).

The courts have repeatedly described summary judgment as a "drastic remedy." See Lecus v. American Mutual Insurance Co., 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). Any reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. Pech and Paetow Claims Service, Inc. v. Heck, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

I. Landowners' duties to avoid exposing their guests to an unreasonable risk of harm should extend to known dangerous animals.

An owner of property must use ordinary care under the existing circumstances to maintain her premises to avoid exposing persons on the property with consent to an unreasonable risk of harm. Wis. JI-Civil 8020, Duty of Owner or Possessor of Real Property to Non-Trespasser User. The instruction goes on to state that "if an unreasonable risk of harm existed and the owner was aware of it, or, if in the use of ordinary care she should have been aware of it, then it was her duty to either correct the condition or danger or warn other persons of the condition or risk as was reasonable under the circumstances." This instruction represents the development of Wisconsin law regarding landowner duties and the abrogation of common law immunities toward certain classes of permitted users. The current standard of ordinary care is the same as that used in all other negligence cases in Wisconsin.

The above standards were first recognized when the Wisconsin Supreme Court declared the duty of a land occupier to persons on the premises with consent to be "ordinary care under the circumstances." Antoniewicz v. Reszczynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975). Antoniewicz was followed by Pagelsdorf v. Safeco Insurance Co. of America, 91 Wis. 2d 734, 284 N.W.2d 55 (1979), in which the court addressed the issue of a landlord's duty toward his or her tenant invitee. The court held that a landlord owes a duty of ordinary care in maintaining her premises to her tenant and others on the premises with permission. The court stated that issues of notice or defect, obviousness, control of premises, etc., are relevant only insofar as they bear on the ultimate issue: "Did the landlord exercise ordinary care in maintenance of the premises under all of the circumstances?"

It follows that the above duties should apply to a landlord who knows or should know of the presence of dangerous animals on her property. In the case of Patterman v. Patterman, 496 N.W.2d 613 (Ct. App. 1992), the court of appeals stated, "A landowner may be liable for negligence associated with a known dangerous dog allowed on his/her property even if the landowner were not the owner or keeper of the animal."

The court of appeals in Patterman cited the Michigan case of Klimek v. Drzewieski, 352 N.W.2d 361 (Mich. App. 1984). In Klimek the plaintiff filed a complaint on behalf of her son who was bitten on the face by a dog

belonging to the defendant's neighbor on the grounds that the defendant knew at the time of the accident that the dog was loose and unsupervised and had previously bitten someone. The trial court granted summary judgment dismissing the plaintiff's complaint and the Michigan Court of Appeals reversed, holding that:

> 1) A loose, unsupervised and dangerous dog either on the property owner's land or in close proximity to his land without an obstacle to prevent it from entering his land is a "condition on the land" within the meaning of the section of the Restatement of Torts (2d) pertaining to the duty of occupiers of land to licensees; 2) The complaint was sufficient to state a claim upon which relief could be granted for breach of duty by occupiers of land to their social guests; and 3) Occupiers of land owe a child social guest a duty to exercise reasonable or ordinary care to prevent injury to the child, and the complaint was sufficient to state a claim for breach of such duty.

In the decision in the present case, the trial court correctly noted that in Patterman, "the court ruled that the victim did not have a common-law negligence claim against the property owner because there was no evidence to suggest the property owner knew the dog was vicious or had a vicious propensity." (A. p. 18) Despite the Patterman court's finding of non-liability, that court's analysis clearly applied general common law negligence principles consistent with Wis. JI-Civil 8020. For instance, as noted by the trial court in this case, the Patterman court specifically stated that the plaintiff in that case had failed to produce evidence of "an essential element of a common-law negligence claim", i.e. that the dog was in fact

dangerous. Patterman, 496 N.W.2d at 615. Such an analysis would be superfluous if no duty existed, and not once did the Patterman court state that the landowner had no duty because he did not own the dog.

Focusing merely on the issue of ownership/control of the animals misses the point of the Smaxwells' claims. All of the parties agree that Thompson did not exercise any control over these animals. The real issue is whether Thompson as landowner properly maintained her property. A jury could find Thompson negligent for completely ignoring such a dangerous condition as that posed by the animals allowed to run at large on her property. It is Thompson's lack of control over the condition of her property that gives rise to the Smaxwells' claims and summary judgment should not have been granted on this issue.

II. The Gonzales and Malone holdings should be clarified, and, to the extent that they create a rule of immunity for non-owners in dog bite cases, overruled.

The trial court and court of appeals held that Gloria Thompson could not be held liable under a theory of common law negligence because she was neither the owner nor the keeper of the dogs that attacked Tatum Smaxwell. In Gonzales v. Wilkinson, 68 Wis. 2d 154, 227 N.W.2d 907 (1975), a young child wandered onto a neighboring tenant's property and was attacked and bitten in the head by the tenant's Basset Hound. The plaintiff sought to impose liability on both the tenant and the landlord under

a claim of maintaining an attractive nuisance. The Supreme Court held that a dog cannot qualify as an attractive nuisance and, therefore, the landlord could not be held liable on such a theory. Id at 157.

Although the parties in Gonzales did not argue this issue, the Chief Justice dissented from the majority opinion and wrote that he would have sustained plaintiff's claims on the basis of common law negligence. Id at 159. The majority responded that because the landlord was neither the owner nor the keeper of the dog, the landlord was not required to be an insurer for the acts of his tenant. Id at 158. Therefore, the Gonzales court held that the landlord did not owe any duty towards the plaintiffs under the circumstances. Id. As noted above, Wisconsin's expansion of landowner duties did not occur until after the Gonzales decision.

In Malone v. Fons, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998), the victim of a dog bite brought an action against the dog owner's landlord and his insurer seeking recovery on a variety of theories. The attack in Malone occurred in a driveway adjacent to, but not on the defendant's property. The plaintiffs in Malone alleged that the landlord was aware that the tenant's dog had previously attacked another person and that the rental agreement between the landlord and tenant prohibited pets, which the landlord failed to enforce. The trial court in Malone ruled that Gonzales prevented the plaintiffs from recovering under their common law

negligence theory. Malone, 217 Wis. 2d at 753. The court of appeals in Malone agreed with the trial court and held that according to the plain language of Gonzales, the landlord would not be liable on common law negligence grounds for the plaintiffs' injuries as a matter of law. Malone, 217 Wis. 2d at 755.

The plaintiffs-appellants in Malone asserted that the effect of Gonzales had been modified by the Patterman and Pagelsdorf cases, *supra*, to "create a common law duty on the part of a landlord for a vicious dog kept by his tenants." Malone, 217 Wis. 2d at 757.

The Malone court disagreed and distinguished Patterman because it did not involve a landlord. Malone, 217 Wis. 2d at 758. Further, the Malone court noted that the Patterman court did not confirm that the plaintiffs had correctly cited the law regarding common law negligence claims against landlords for injuries caused by dangerous dogs on their premises. Malone, 217 Wis. 2d at 759. The court of appeals also stated that the Patterman court could not have allowed such claims because to do so would conflict with the Supreme Court's holding in Gonzales. Malone, 217 Wis. 2d at 759.

The appellants in Malone countered that, by abandoning the general rule of non-liability for landlords, the Supreme Court in Pagelsdorf effectively overruled Gonzales' holding that a landlord may not be liable,

on common law negligence grounds, for injuries caused by tenant's dogs. Malone, 217 Wis. 2d at 759. The Malone court distinguished Pagelsdorf because it involved a defective wooden porch railing, not a dog bite. Malone, 217 Wis. 2d at 761. The Malone court stated that the appellants "cited no persuasive authority for the proposition that a tenant's dog should be considered a 'defect' of the premises, or that a landlord's act of permitting a tenant to own a dog should be equated with a landlord's failure to repair a defect, or to properly 'maintain the premises'." Id.

It is undoubtedly clear that landowners' duties toward permitted users of their property were greatly expanded by the Pagelsdorf decision and that such duties were not recognized by Wisconsin courts when the Gonzales opinion was rendered. It is crucial to note that the Gonzales court specifically chose not to consider whether to abrogate the historic immunities enjoyed by landlords based on the record in that case. Gonzales, 68 Wis. 2d at 158. Moreover, Gonzales did not involve injury to a guest and wasn't even a negligence case, but rather was brought under an attractive nuisance theory.

After Pagelsdorf, a landowner "must use ordinary care under the existing circumstances to maintain his or her premises to avoid exposing persons on the property with consent to an unreasonable risk of harm." Wis. JI-Civil 8020. Thus, the real issue should be whether a dangerous

animal may be considered a defect on a landowner's property and whether failing to protect persons on the property with consent from such dangerous animals may constitute failure to use ordinary care to maintain the premises.

The court of appeals in the present case ignored that Malone is factually distinguishable because the attack in that case did not occur on the landowner's property. Therefore the duties set forth in Wis. JI-Civil 8020 did not apply to the defendant in that case and it might be possible to reconcile the Malone and Patterman decisions without undermining the validity of either. Further, the Malone court did not correctly distinguish Patterman. The plaintiffs in Patterman did cite authority for the proposition that a loose, unsupervised and dangerous dog may be a "condition on the land" within the meaning of the second Restatement of Torts, and that failure to protect social guests from such conditions may constitute a breach of duty owed by the owner of the land.

The trial court acknowledged that the Smaxwells' "claim that Thompson is guilty of negligent conduct under the facts alleged is not entirely without merit." (A. p. 21) The court noted that "Both the Wisconsin Supreme Court and the Court of Appeals have been divided in cases similar to this one. Perhaps the law will someday impose liability on landlords or landowners who are not owners of dogs who attack on their property where such landlords are negligent." (Id.) The trial court wrote that it was "powerless" to come to a different conclusion here and decided

that "Thompson's conduct, even if negligent, cannot form the basis for liability under the current state of the law in Wisconsin." (Id.)

The trial court and court of appeals each followed the Malone interpretation of Gonzales, and disregarded Patterman. The Supreme Court should take this opportunity to at least clarify that the Gonzales and Malone decisions do not create a rule of immunity for nonowners in all dog bite cases and that these holdings are limited to claims brought by persons who were not injured on the landlord's property or who were not on the property with permission. To the extent these decisions do create a rule of immunity for nonowners in all dog bite cases, they should be overruled.

III. Public policy does not preclude Thompson's liability as a matter of law.

It is incorrect to simply state that Thompson "owed no duty" to the Smaxwells under Wisconsin law. In making such a decision here, the trial court was really making a premature public policy judgment.

In Alvarado vs. Sersch, 2003 WI 55, 662 N.W.2d 350, 262 Wis.2d 74, the Supreme Court recently summarized the laws of negligence and liability as follows:

> Every person has a duty to use ordinary care in all of his or her activities, and a person is negligent when that person fails to exercise ordinary care. [citing Gritzner v. Michael R., 2000 Wi 68, ¶¶29 & 22, 611 N.W.2d 906] In Wisconsin a duty to

use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person. Id. ¶20. Under the general framework governing the duty of care, "a person is not using ordinary care and is negligent, if the person, without intending to do harm does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property". Id. at ¶22 (quoting Wis JI–Civil 1005).

The question of duty is nothing more than an "ingredient in the determination of negligence." A.E. Investment Corp. v. Link Builders, 62 Wis.2d 479, 484, 214 N.W.2d 764 (1974). Once it has been determined that a negligent act caused the harm, "the question of duty is irrelevant and a finding of nonliability can be made only in terms of public policy." Id. at 485, 214 N.W.2d 764.

The duty ingredient of negligence should not be confused with public policy limitations on liability. (Footnote omitted). "The doctrine of public policy, not the doctrine of duty, limits the scope of the defendant's liability." Bowens v. Lumbermans Mut. Cas. Co., 183 Wis.2d 627, 644, 517 N.W.2d 432 (1994). "In Wisconsin, one always owes a duty

of care to the world at large, which is why 'the consistent analyses of the court reveal that the question of duty is not an element of the court's policy determination." [citing Rockweit v. Senecal, 197 Wis.2d 409, 433, 541 N.W.2d 742 (1995) (Abrahamson, J. concurring) quoting A.E. Investment, 62 Wis.2d at 484, 214 N.W.2d 764]. Alvarado, ¶¶14-16.

The Alvarado court goes on to state:

Thus, negligence and liability are distinct concepts. A.E. Investment, 62 Wis.2d at 484-85, 214 N.W.2d 764. After negligence has been found, a court may nevertheless limit liability for public policy reasons. Gritzner, 235 Wis.2d 781, ¶24, 611 N.W.2d 906; Rockweit, 197 Wis.2d at 421, 541 N.W.2d 742, A.E. Investment, 62 Wis.2d at 484, 214 N.W.2d 764. The public policy considerations that may preclude liability are: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor's culpability; (3) in retrospect, it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowing recovery would place too unreasonable a burden on the tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; and (6) allowing recovery would enter a field that has no sensible or just

stopping point. Gritzner, 235 Wis.2d 781, ¶27, 611 N.W.2d 906.

In most cases, the better practice is to submit the case to the jury before determining whether the public policy considerations preclude liability. Alvarado ¶¶17-18.

In the present case it was never really disputed that the Smaxwells could establish a prima facie case of negligence against Thompson. Thompson had the duty to maintain her property in a reasonably safe condition and protect guests on her property from unreasonable risk of harm. Thompson knew about the dangerous animals on her property, yet took no action to prevent those animals from running at large or to warn her guests of the dangerous condition. Thompson's failure to act is causally connected to the presence of the dogs on her property that attacked Tatum Smaxwell; and damages are obvious.

Public policy considerations do not support immunity for landowners in cases such as the present one. It had become clear for several years before the attack on Tatum Smaxwell that Melva Bayard disregarded the safety of others and was not going to take action to control her animals. Yet Gloria Thompson did nothing to protect guests on her property from the danger posed by these animals. It was entirely foreseeable that someone would eventually be injured by the animals. The nature of the injuries was consistent with the dangers associated with wolf dog hybrids. Allowing

recovery would not place any more of a burden on the landlord than building codes or other requirements for maintaining a safe premises. Nor would allowing recovery in this case enter a field without any stopping point. Wis. JI-Civil 8020 provides a standard of care that by no means makes landlords insurers for their tenants but simply specifies the nature of landowner's duties.

To hold that landlords are immune in cases such as this goes against public policy. The current decision encourages landlords to turn a blind eye toward the presence of dangerous animals on their property. By doing nothing, landlords can ensure that no argument can be made that they exercised any control over the animals and therefore, they cannot be liable.

Through her ability to control access to and use of her property like any other landlord, Thompson had at least an indirect ability to control the risk posed by the dogs in this case. Thompson did not need to be an owner or keeper of the dogs within the meaning of Wis. JI-Civil 1391 to take some sort of action to protect others on her property with permission from the dangerous condition posed by the dogs. She could have evicted the owner of the dogs after she received dozens of citations for the animals running at large. She could have prohibited such a large kennel operation. She could have inspected and/or repaired the kennels herself to ensure their safety. She could have built a fence to keep the dogs off the rest of her property. She could have required her grandchildren to play in her already fenced-in

back yard. She could have warned her guests of the dogs or against allowing children to play outside unattended. Yet she did none of these things and a jury should be able to decide whether Thompson was negligent.

Thompson's control over her land gives rise to her duties in this case. The property owner must use ordinary care to maintain his or her premises to avoid exposing persons on the property with consent to an unreasonable risk of harm - it shouldn't matter whether the risk is posed by a man-made building or structure, or a natural object, or an animal for that matter.

The most fair way to resolve this dilemma is to conclude that the landowner's liability may extend to situations involving the presence of known dangerous animals on the property. Animal ownership should not be the sole determinative factor regarding liability. The issues of whether the landowner knew or should have known that the animals were actually dangerous and whether the owner acted with ordinary care under the circumstances are questions of fact that should be resolved by the jury, not the court as a matter of law. In the present case, a jury should determine whether Thompson was negligent. The time has come for all Wisconsin Courts to recognize that dog owners should not be the only parties responsible for protecting citizens from the risks posed by known dangerous animals. Landowners should be held to the same standard for these risks as

any other dangerous conditions on their property.

CONCLUSION

For the reasons stated above, petitioners respectfully request that the Supreme Court reverse the Court of Appeals decision and remand plaintiffs' claims against Gloria Thompson and Heritage Mutual Insurance Company for trial.

Dated this 19th day of February, 2004.

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CERTIFICATION

I certify that this Brief and Appendix conforms to the rules using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point text in Times New Roman font. The length of this brief 5483 is words.

Dated this 19th day of February, 2004.

Jordan P. Blad

APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0098 Cir. Ct. No. 01CV000246

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

TATUM SMAXWELL, A MINOR, TANYA SMAXWELL AND GREG SMAXWELL,

PLAINTIFFS-APPELLANTS,

V.

MELVA BAYARD, MANITOWOC COUNTY AND EMPLOYERS HEALTH INSURANCE COMPANY,

DEFENDANTS,

GLORIA THOMPSON AND HERITAGE MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. Tatum Smaxwell, a minor, and her parents, Tanya Smaxwell and Greg Smaxwell (collectively, the Smaxwells), appeal from a summary judgment dismissing their negligence action against Gloria Thompson and her insurer, Heritage Mutual Insurance Company (Heritage Mutual). Tatum was seriously injured by a dog owned by a tenant of Thompson's; the Smaxwells sued Thompson for negligence but the circuit court dismissed Thompson from the action upon summary judgment, concluding Thompson's actions, even if negligent, could not form the basis for liability under Wisconsin law. We agree and therefore affirm the summary judgment.

FACTS

¶2 At all times relevant to this decision Thompson owned two parcels of property located on County Trunk Highway CR in Manitowoc county. The larger of the two parcels, consisting of 2.91 acres, included Thompson's residence as well as a former motel property converted into apartments. Three of these apartment units were occupied in June 1999. Melva Bayard and Richard Hines rented one of these apartments. Thompson's daughter, Tanya Smaxwell, lived in another of the units with her children, Darion, Tatum and Jayme. Nicole Klein, another of Thompson's daughters, occupied a third apartment with her children, Nick and Rochelle.

¶3 Thompson owned a second smaller parcel of land behind this first parcel. Although she did not charge any additional rent, since the early 1990s Thompson had allowed Bayard to house some of her dogs on this parcel. Thompson did not know the exact number of dogs Bayard kept on the property but was aware there were a number of dogs, including wolf hybrids. Thompson was also aware that law enforcement personnel had made several visits to Bayard

about the dogs and that one of the dogs had bitten a police officer. Thompson had received a citation about the dogs in 1996, although the result of that citation is unclear. Thompson took no active role in caring for the dogs and, in fact, had not even viewed the conditions under which the dogs were housed since the mid-1990s.

¶4 It is undisputed there was a long history of complaints from neighbors to the Manitowoc County Sheriff's Department prior to the incident at hand and that Thompson was aware of many complaints. The complaints date back to 1992 and total more than seventy in number. In a number of complaints, neighbors reported dogs running at large or expressed fear based on threatening and vicious wolf hybrid-looking dogs. A sheriff's report from August 29, 1992, indicates a sheriff's officer was bitten by a German shepherd owned by Bayard. In December 1995, a caller indicated the dogs had killed his pigeons. In 1999, Bayard admitted some of her own puppies had been killed by the dogs.

¶5 On the morning of June 15, 1999, Tanya Smaxwell was visiting Thompson's house with her three-year-old daughter Tatum and her infant son Jayme. Klein and her children were also present. As the three adults were preparing to drink coffee on the porch, Tatum was allowed to go outside with five-year-old Nick, who offered to watch her. Before the adults got outside, Nick returned to the house, screaming that the dogs had gotten Tatum. Three of Bayard's wolf hybrid dogs, each weighing approximately seventy-five pounds, were on top of Tatum, attacking her. Thompson and Tanya succeeded in getting Tatum away from the dogs but not before Tatum sustained serious injury. The dogs were loose because Bayard had forgotten to close the latch to their kennel the previous night.

¶6 On July 2, 2001, the Smaxwells brought this action against Bayard, Thompson, Heritage Mutual and Manitowoc County for negligence. Bayard did not respond to the summons and complaint and has not appeared in this case. Thompson denied liability and on March 8, 2002, she filed a motion for summary judgment. The circuit court granted Thompson's motion for summary judgment, concluding that her conduct, even if negligent, could not form the basis for liability under current Wisconsin law. The Smaxwells appeal.

DISCUSSION

¶7 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). That methodology is well known and need not be repeated here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2) (2001-02).[1] Because there are no material facts at issue in this case, we must determine which party is entitled to judgment as a matter of law. ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 501-02, 577 N.W.2d 617 (1998).

¶8 In order to constitute a cause of action for negligence, there must exist (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the plaintiff's injury; and (4) an actual loss or damage as a result of injury. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶28, 241 Wis. 2d 804, 623 N.W.2d 751. The

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Smaxwells argue that, as a landlord, Thompson had a duty to avoid exposing persons on her property to an unreasonable risk of harm and a duty to protect or warn her guests of the risks posed by known dangerous animals on her property. We disagree. A landlord is not liable on common law negligence grounds for the acts of a tenant's dog.

¶9 The facts at hand are remarkably similar to those of ***Gonzales v. Wilkinson***, 68 Wis. 2d 154, 227 N.W.2d 907 (1975), and ***Malone v. Fons***, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998). In ***Gonzales***, a young child wandered onto a neighboring tenant's property and was attacked and bitten on the head by the tenant's dog. ***Gonzales***, 68 Wis. 2d at 155. The plaintiffs sought to impose liability on both the tenant and the landlord under a claim of maintaining an attractive nuisance. ***Id.*** The Wisconsin Supreme Court, reviewing only the claim against the landlord, held that the attractive nuisance doctrine was unavailable to the plaintiffs. ***Id.*** at 157. The ***Gonzales*** majority concluded that "the ownership and control of the premises created no duty on the part of the owner of the premises to the plaintiffs." ***Id.*** at 158.

¶10 In ***Malone***, an eight-year-old girl was bitten and sustained serious injury by a tenant's dog while in a driveway adjacent to the tenant's residence, a residence owned by the landlord Fons. ***Malone***, 217 Wis. 2d at 750. The Malones sued Fons, alleging both common law negligence and strict liability under WIS. STAT. § 174.02. ***Malone***, 217 Wis. 2d at 751. We rejected the Malones' arguments, acknowledging the holding of ***Gonzales***. ***Malone***, 217 Wis. 2d at 753-55. We concluded that the ***Gonzales*** court's ultimate holding was that a landlord, who is not an owner or keeper of a tenant's dog and who does not exercise dominion and control over the dog, is not liable on common law negligence grounds for the acts of the dog. ***Malone***, 217 Wis. 2d at 755.

¶11 This rule is also consistent with cases concerning nonlandlord-related common law negligence dog bite claims and with the jury instruction covering the common law liability of the owners or keepers of animals. ***Id.*** at 755-56. Both hold that only an owner or a keeper of an animal can be held liable for common law negligence. ***Id.*** at 756. ***Gonzales*** simply extended the common law rule to a landlord-tenant situation. ***Malone***, 217 Wis. 2d at 757. A landlord is normally neither an owner nor a keeper of his or her tenant's dogs nor does a landlord usually exercise any control over those dogs. ***Id.*** Hence, a landlord is not liable under the common law for any injuries caused by a tenant's dog. ***Id.*** Thus, according to the plain language of ***Gonzales*** and ***Malone***, Thompson is not liable on common law negligence grounds for the dog bites inflicted upon Tatum by the tenant's dogs. *See* ***id.***

¶12 The Smaxwells argue that their claims are not precluded by ***Gonzales*** or ***Malone*** because public policy favors the ***Pattermann v. Pattermann***, 173 Wis. 2d 143, 496 N.W.2d 613 (Ct. App. 1992), standard for landowner liability in dog bite cases. The Malones made nearly identical arguments to those offered by the Smaxwells, arguments that we firmly rejected. According to the plain language of ***Gonzales*** and now ***Malone***, a landlord is not liable, on common law negligence grounds, for dog bites received from a tenant's dog and neither ***Pagelsdorf v. Safeco Ins. Co. of America***, 91 Wis. 2d 734, 284 N.W.2d 55 (1979), nor ***Pattermann*** has modified this holding. ***Malone*** expressly acknowledged the holdings of both ***Pattermann*** and ***Pagelsdorf*** and rejected them both.

¶13 In ***Malone***, we concluded that ***Pattermann*** did not represent a shift in the law of ***Gonzales***. We observed that the ***Pattermann*** facts were markedly different from the ***Malone*** facts. ***Malone***, 217 Wis. 2d at 758. In ***Pattermann***, the Pattermann family gathered at Sallie Pattermann's home in preparation for a

family reunion. ***Pattermann***, 173 Wis. 2d at 148. Scott Pattermann and his family arrived from Florida with their dog. Sallie allowed the dog to be placed in a hallway, and shortly thereafter, Erin Pattermann, another guest, arrived. ***Id.*** When Erin bent down to pet the dog, the dog jumped up and bit her in the face. ***Id.*** The plaintiff's complaint alleged common law negligence and strict liability claims under WIS. STAT. § 174.02 against Sallie. ***Pattermann***, 173 Wis. 2d at 148-49. We stated that a "landowner ... may be liable for negligence associated with a known dangerous dog allowed on [his or] her premises." ***Id.*** at 151.

¶14 Like the Malones, the Smaxwells pounce on this statement and argue they meet the ***Pattermann*** requirements for common law negligence in Wisconsin. *See* ***Malone***, 217 Wis. 2d at 758. However, as we acknowledged in ***Malone***, although ***Pattermann*** did involve a dog bite and a property owner, nowhere in the case is there a discussion of the duties of a landlord. ***Malone***, 217 Wis. 2d at 758. We therefore found the suggestion that the ***Pattermann*** court intended its holding to apply to landlords speculative at best. ***Malone***, 217 Wis. 2d at 758-59. In addition, we further concluded that ***Pattermann*** cannot be read to allow common law negligence claims against landlords for injuries caused by dangerous dogs on their premises because such a holding would expressly conflict with the supreme court's prior holding in ***Gonzales***. ***Malone***, 217 Wis. 2d at 759. We have no authority to overrule, modify or withdraw language of a supreme court decision. ***Id.***[2] We concluded that ***Pattermann*** did not overrule or modify the ***Gonzales***

[2] The Smaxwells also argue that we "failed to effectively distinguish ***Pattermann***" in ***Malone***. While we, of course, disagree with this conclusion, ***Malone*** remains a valid, unreversed opinion and we have no authority to overrule, modify or withdraw language from our previous decisions. ***Cook v. Cook***, 208 Wis. 2d 166, 185-90, 560 N.W.2d 246 (1997).

holding that a landlord is not liable under the common law for any injuries caused by a tenant's dog.

¶15 We further concluded in ***Malone*** that ***Pagelsdorf***, another case relied upon by the Smaxwells, was limited to situations dealing with property maintenance and property defect issues, not dog bite claims. In ***Pagelsdorf***, the plaintiff, a neighbor, was injured when a rotted railing collapsed due to the landlord's failure to maintain the premises. ***Pagelsdorf***, 91 Wis. 2d at 735-37. As we noted in ***Malone***, ***Pagelsdorf*** was not a dog bite case but broke new ground and set a new standard for landlords in the maintenance of their rental property. ***Malone***, 217 Wis. 2d at 759. ***Pagelsdorf*** adopted a rule that a landlord is under a duty to exercise ordinary care in the maintenance of the premises. ***Pagelsdorf***, 91 Wis. 2d at 741; ***Malone***, 217 Wis. 2d at 760. In ***Malone***, we concluded that ***Pagelsdorf***'s rule is limited to situations dealing with property maintenance issues and defects on the premises and thus did not overrule ***Gonzales***'s rule regarding dog bites. ***Malone***, 217 Wis. 2d at 760.

¶16 Thus, in the similar factual situation of ***Malone***, we addressed and rejected nearly identical arguments to those advanced by the Smaxwells here. We see no reason why the same logic should not apply here. Thompson, as a landlord, cannot be held liable under common law negligence grounds for the acts of her tenant Bayard's dogs.

¶17 The Smaxwells argue that despite the aforementioned cases contradicting their cause of action, public policy favors the ***Pattermann*** standard for landowner liability in dog bite cases, arguing that "[t]he time has come for all Wisconsin Courts to recognize that dog owners should not be the only parties responsible for protecting citizens from the risks posed by known dangerous

animals." However, as we have stated so many times in the past, we are bound by the law as it exists; we have no authority to overrule, modify or withdraw language of another court of appeals decision or a supreme court decision. ***Malone***, 217 Wis. 2d at 759. We are an error-correcting court; public policy considerations are not for us to determine but are considerations to be addressed by the Wisconsin Supreme Court. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988).

CONCLUSION

¶18 We agree with the circuit court that Thompson's actions, even if negligent, could not form the basis for liability under Wisconsin law as a landlord cannot be liable under the common law for any injuries caused by a tenant's dog. We therefore affirm the summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

State of Wisconsin Circuit Court Manitowoc County

Tatum Smaxwell, a minor,
Tanya Smaxwell, and
Greg Smaxwell,
Plaintiffs

vs. Case No. 01 CV 246

Melva Bayard,
Gloria Thompson,
Heritage Mutual Insurance Co.,
Manitowoc County, and
Employers Health Insurance Co.,
Defendants.

DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Complaint in this case alleges that on June 15, 1999 one of the plaintiffs, Tatum Smaxwell, age three at the time, was seriously injured when she was attacked by three dogs owned by Melva Bayard. The attack occurred on property owned by Gloria Thompson. Prior to the incident, the Manitowoc County Sheriff's Department had received a significant number of complaints concerning Bayard's dogs running at large. Additional facts are set forth below.

The following motions for summary judgment have been filed by the parties:

1. Gloria Thompson has moves for summary judgment dismissing the complaint on the basis that she is not responsible for the attack as a landowner nor as a landlord.

2. Manitowoc County moves for summary judgment dismissing the complaint against it, asserting the County has discretionary immunity from any claim under Wis. Stats. §893.80(4).

3. Thompson's insurer, Heritage Mutual Insurance Company ("Heritage"), moves for summary judgment on grounds that Thompson has no personal liability, and if she does, it does not fall within the coverage provisions of Heritage's liability policy.

4. Heritage also moves for summary judgment against Employers Health Insurance Company, n/k/a Humana ("Humana") on Humana's subrogation counterclaim against Heritage on the grounds such a counterclaim is barred under federal law.

5. The plaintiffs join in Heritage's motion for summary judgment against Humana for the same reasons asserted by Heritage.

All of the moving parties have filed written briefs in support of their positions.

FACTS

The affidavits submitted by the parties consist of largely undisputed facts. With regard to the motions for summary judgment filed by Gloria Thompson, Heritage and Manitowoc County seeking dismissal of the complaint, the court views the facts

most favorable to the plaintiffs. For purposes of deciding these motions, those facts may be summarized as follows:

At all relevant times Gloria Thompson owned two parcels of property located on County Trunk Highway CR in Manitowoc County. The larger of the two parcels, consisting of 2.91 acres, included Gloria Thompson's residence as well as a former motel property which had been converted into apartments. Three of the apartment units were occupied in June of 1999. Melva Bayard and Richard Hines rented one of the apartment units. Gloria Thompson's daughter, Tanya Smaxwell, lived in another of the units with her children Darion, Tatum, and Jayme. Nicole Klein, another of Gloria Thompson's daughters, occupied a third apartment with her children Nick and Rochelle.

Gloria Thompson owned a second smaller parcel of real estate located behind the 2.91 acre parcel. Although she did not charge any additional rent, Gloria Thompson had permitted Melva Bayard to house some of her dogs on this smaller parcel since the early 1990s. Thompson did not know the number of dogs Bayard kept on the property, but was aware that there were a number of dogs, including wolf hybrids. Thompson was also aware that law enforcement personnel had made several visits to Ms. Bayard concerning her dogs and that one of the dogs had bitten a police officer. Thompson herself apparently received a citation regarding the dogs in 1996, though the facts presented to the

court give no indication as to what happened as a result of the citation being issued. Thompson took no active role in caring for the dogs and apparently had not even viewed the conditions under which the dogs were housed since the mid-1990s.

It is undisputed that there was a long history of complaints from neighbors to the Manitowoc County Sheriff's Department regarding Melva Bayard's dogs prior to the attack on Tatum Smaxwell and that Thompson was aware of many complaints. The complaints go back to 1992 and total more than 70 in number. Without itemizing them here, the majority of the complaints are for the dogs running at large. In a number of complaints neighbors express fear based on wolf hybrid-looking dogs being allowed to run at large. A report from August 29, 1992 indicates a sheriff's officer was bitten by a German Shepard dog owned by Ms. Bayard. In a December, 1995 complaint the caller indicated that the animals have killed his pigeons in the past. In 1999 Melva Bayard admitted that some of her own puppies had been killed. Other complaints report that various wolf hybrid dogs were threatening and vicious, but there appear to be no other specific complaints involving an actual attack by any of Melva Bayard's dogs on a person or another animal.

On the morning of June 15, 1999 Tanya Smaxwell was visiting Gloria Thompson at Thompson's home. Tanya had her 3-year-old daughter Tatum and her infant son Jayme with her. Thompson's

other adult daughter, Nicole Klein, and her children were also present. As the three adults were preparing coffee to drink on the porch, Tatum was allowed to go outside with her 5-year-old cousin Nick, who offered to watch her. Before the adults got outside with their coffee, Nick came running back into the house, screaming that the dogs had gotten Tatum. Three of Melva Bayard's wolf hybrid dogs, each weighing approximately 75 pounds, were on top of Tatum attacking her. Gloria and Tanya succeeded in getting Tatum away from the dogs, but not before Tatum sustained serious injury. The dogs were able to get loose because Bayard forgot to close the latch to their kennel the night before.

Tatum and her parents have sued Melva Bayard, the owner of the dogs; Gloria Thompson, as the owner of the property on which the attack occurred and as Melva Bayard's landlord; Heritage Mutual Insurance Co., as Gloria Thompson's liability insurer; Manitowoc County, on the basis that Manitowoc County had a duty to remove the dogs before the attack occurred; and Humana, which is seeking reimbursement for medical expenses paid on behalf of Tatum Smaxwell.

SUMMARY JUDGMENT ANALYSIS

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Wis. Stats. 802.08(2). The first step in addressing a motion for summary judgment is to examine the pleadings to determine whether they state claim for relief. Transportation Insurance Company v. Hunzinger, 179 Wis. 2d 281, 289 (1993). If the pleadings do state a claim for relief, the court must examine the evidentiary record as a whole to determine whether there is a genuine issue as to any material fact. A party seeking summary judgment must "demonstrate...that there is no triable issue of material fact on any issue presented". Heck and Paetow v. Heck, 93 Wis. 2d 349, 356 (1980). Summary Judgment is not to be granted "unless the moving party demonstrates a right to a judgment with such clarity to leave no room for controversy...". Grams v. Boss, 97 Wis. 2d 332, 338 (1980).

1. GLORIA THOMPSON MOTION FOR SUMMARY JUDGMENT.

The facts relevant to Gloria Thompson's motion for summary judgment are not in serious dispute. She allowed Bayard to keep dogs, including wolf hybrids, on her adjoining property for a number of years. The dogs had a history of running at large and Thompson was aware of that fact. In at least one case in 1992, Thompson was aware one of the dogs had bitten a Sheriff's

Department officer. There's no allegation that any of the dogs had previously attacked either Thompson, any member of her family, or any other invitees. While Thompson was aware of a history of problems relating to Bayard's dogs, there's no indication that Thompson knew anything in particular about the three dogs who participated in the attack on Tatum Smaxwell.

Gloria Thompson maintains that because she was neither the owner nor the keeper of the dogs involved in the attack, she cannot be held responsible for the injuries inflicted by Melva Bayard's dogs on Tatum Smaxwell. A number of Wisconsin reported decisions have considered claims similar to that made in this case. In Gonzales v. Wilkinson, 68 Wis. 2d 154 (1975), the Supreme Court ruled that a landlord is not responsible for the attack of a dog owned by his tenant. The complaint in Gonzales alleged that the landlord had been aware his tenant's dog had bitten other individuals in the past, before it bit the one and one half year old plaintiff who wandered onto the landlord's property. The defendant in Gonzales was not only the landlord, but the other occupant of the duplex in which the tenant who owned the dog lived. That is, the defendant was a landlord and an owner-occupant. Though the complaint was based on an attractive nuisance theory, the dissent argued that the complaint stated a valid common law negligence claim:

> " . . . because the complaint, liberally construed, does allege a cause of action as against Wilkinson on the ground of negligence in that he allegedly *owned and lived* on the premises, *controlled and maintained the dog and knew of the dog's viciousness* while failing to take reasonable precautions to prevent injuries from occurring." 68 Wis. 2d at 159 (emphasis added).

The majority rejected this conclusion, ruling as follows:

> "Although not argued by the parties, a minority of the court would hold the complaint sufficient to state a cause of action against the landowner Wilkinson upon the basis of common-law negligence. The majority does not agree. In examining the complaint we find no allegation that James Wilkinson was either the owner or the keeper of the dog, nor is it alleged that he in any way had any dominion over the dog. There is an allegation that he knew his tenant, Ray Prueher, maintained a vicious dog on the premises but the law does not require him, as the owner of the building, to be an insurer for the acts of his tenant. Under the allegations of this complaint, we hold that the ownership and control of the premises created no duty on the part of the owner of the premises to the plaintiffs." 68 Wis. 2d at 158.

While there is no specific discussion in Gonzales concerning the defendant's liability as an owner-occupant rather than as a landlord, there is also no suggestion that he was subject to any separate liability because he was an owner-occupant.

The District III Wisconsin Court of Appeals considered the issue of a landowner's liability for a bite inflicted by the dog of an invitee in Pattermann v. Pattermann, 173 Wis. 2d 143 (Ct. App. 1992). In Pattermann, a dog owned by the property owner's adult son bit the fiancee of another of the property owner's sons. The court ruled that the victim did not have a common-law

negligence claim against the property owner because there was no evidence to suggest the property owner knew the dog was dangerous or had a vicious propensity. The decision does contain the following sentence:

> "Even if Sallie (the landowner) were not the owner or keeper of the animal, as the landowner she may be liable for negligence associated with a known dangerous dog allowed on her premises. *See, e.g.* Klimek v. Drzewiecki, 352 NW 2d 361 (Mich. App. Ct. 1984)." 173 Wis. 2d at 151.

While this dicta could be taken as the conclusion of the court that landowners can be held liable for allowing a known dangerous dog on their premises, the court indicated in a footnote that because the plaintiff could not prove the landowner possessed any culpable knowledge "we will assume without deciding that Aaron (the plaintiff) correctly states the law." *Id.* Thus, the court appeared to go out of its way to point out it was not deciding whether or not a landowner could be liable. The court simply held that even if Wisconsin adopted the theory of liability accepted in Michigan, the facts in the case would not support a claim based on such theory.

A more recent Court of Appeals decision contains dicta reiterating that landowners who are neither owners or keepers of animals owe no duty to animal bite victims. In Malone v. Fons, 217 Wis. 2d 746 (Ct. App. 1998) eight-year old Sarah Malone was bitten by a Rottweiler owned by the defendant's tenant while she

was in a driveway adjoining the defendant's property. The trial court granted summary judgment in favor of the defendant-landlord. For purposes of the appeal, the District I Court of Appeals considered as true the plaintiff's claim that the landlord knew the dog had previously broken free of his leash, run across the street and placed his jaws around the arm of another child, that the father of that child-victim had complained to the landlord, and that the lease had a provision prohibiting the tenant from keeping pets on the premises. The Court of Appeals upheld the summary judgment decision, citing WI JI-CIVIL 1391 and prior Wisconsin cases. Specifically, the court ruled as follows:

> "The jury instruction, while not precedent setting, is, nonetheless, persuasive authority. Clearly, the instruction only contemplates liability for owners or keepers of animals, defined as those who own, or have possession and control of animals. Non-landlord-related animal injury cases also restrict common-law negligence liability to those who are owners or keepers of the animals." 217 Wis. 2d at 756.

The court went on to conclude that nothing in Pattermann overruled or modified Gonzales, and that later cases which expanded the duties of landlords have not changed the longstanding rule that landlords are not considered owners or keepers of their tenants dogs for liability purposes.

Although both the Gonzales and Malone opinions were followed by spirited dissents, the consistent holding in

reported Wisconsin decisions has been that landlords are not responsible for the actions of their tenant's dogs. Plaintiffs point to WIS JI-CIVIL 8020 and the cases cited in the Comment to that instruction which have expanded the liability of landlords in recent years. It's true that on its face, WIS JI-CIVIL 8020 could be read to impose liability on Gloria Thompson for her alleged actions in this case. However, the court cannot ignore the specific case law relating to landlord immunity for the acts of a tenant's dogs and WIS JI-CIVIL 1391. Case law has carved out a specific exception from the general rule of owner liability resulting from attacks of animals not owned or kept by the landowner.

Humana argues that this case is not controlled by prior case law immunizing *landlords* from liability because Thompson has liability as a *landowner*. However, WIS JI-CIVIL 8020 does not distinguish between landlords and landowners. No Wisconsin case has ever imposed liability on a landowner for injury caused by an animal owned or kept by another. Other jurisdictions have imposed such liability, as evidenced by the Michigan Klimek decision cited as dicta in Pattermann, but Wisconsin has not joined that group. As noted above, the landlord in Gonzales was also the landowner of the real estate on which the dog attack occurred, but the Supreme Court still found no liability. Also, it is worthwhile to note that while Thompson arguably did know

Bayard's dogs were vicious, as opposed to the defendant in Pattermann, Thompson did not knowingly permit the dogs on her to be loose on her property, as did the defendant in Pattermann. The dogs were loose on Thompson's property because the owner, Bayard, neglected to lock the cage door. The elements suggested in Pattermann as a possible basis for liability, that the owner knowingly and intentionally permitted a vicious dog loose on the owner's property, are not present here because Thompson is not alleged to have intentionally permitted the dogs on her property uncaged.

The plaintiffs' and Humana's claim that Thompson is guilty of negligent conduct under the facts alleged is not entirely without merit. Both the Wisconsin Supreme Court and the Court of Appeals have been divided in cases involving landlord/landowner liability in cases similar to this one. Perhaps the law will someday impose liability on landlords or landowners who are not owners of dogs who attack on their property where such landlords or landowners are negligent. However, our appellate courts have consistently found no landowner liability in these cases and this court is powerless to come to a different conclusion here. As noted by Thompson in her brief, the court of appeals recognized policy reasons for not imposing liability on landlords who were not owners or keepers of a tenant's dog:

> "We also note in passing that to decide otherwise could very well lead to the abolishment of dogs in rental properties. Landlords and their insurance carriers would be reluctant to allow tenants to keep any dogs for fear of liability under § 174.02, STATS. Such a development would deprive those who are unable to afford their own homes of the many positive benefits of dog ownership. Also, we believe our ruling promotes the sentiment expressed by the Washington court in *Clemmons v. Fidler*, 791 P.2d 257 (Wash. Ct. App. 1990) that: 'Our rule also promotes the salutary policy of placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability.' Id. at 260." Malone, *supra*, at 766.

Thompson's conduct, even if negligent, cannot form the basis for liability under the current state of the law in Wisconsin. Thompson is therefore entitled to summary judgment dismissing the claims against her.

2. MANITOWOC COUNTY MOTION FOR SUMMARY JUDGMENT.

Plaintiffs assert a claim against Manitowoc County based on the County's alleged negligence in failing to protect the public from a situation which created a foreseeable grave risk of harm. Plaintiffs allege that the 72 complaints investigated by the Sheriff's Department and the at least 20 citations which were issued in relation to Melva Bayard's dogs created a duty on the part of the County to protect the plaintiffs from attack by the dogs. Specifically, plaintiffs argue in their brief that a letter from Lieutenant Richard Thorrington to the DNR in 1993

indicating the County had issued an ultimatum to Bayard that she either dispose of her dogs or the Sheriff's Department would do so for her created a ministerial duty on the part of the County to dispose of the dogs. In addition, plaintiffs contend that the history of problems with the dogs created a known present danger which required the County to remove Bayard's dogs prior to the attack in this case.

Manitowoc County counters that it has no liability in this case because its actions are immune from liability under §893.80(4). The law on municipal immunity has recently been summarized by our Supreme Court as follows:

> "¶ 23. Immunity for public officers and employees, both state and municipal, is based largely upon public policy considerations that spring from the interest in protecting the public purse and a preference for political rather than judicial redress for the actions of public officers. *See Kierstyn*, 228 Wis.2d at 89-90. The policy considerations include:
>
> (1) The danger of influencing public officers in the performance of their functions by the threat of a lawsuit;
>
> (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service;
>
> (3) the drain on valuable time caused by such actions;
>
> (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and
>
> (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

Lister v. Board of Regents, 72 Wis.2d 282, 299, 240 N.W.2d 610 (1976).

¶ 24. Both state and municipal immunity are subject to several exceptions "representing a judicial balance struck between `the need of public officers to perform their functions freely [and] the right of an aggrieved party to seek redress.'" *C.L. v. Olson*, 143 Wis.2d 701, 710, 422 N.W.2d 614 (1988) (*quoting Lister*, 72 Wis.2d at 300). There is no immunity against liability associated with: 1) the performance of ministerial duties imposed by law; 2) known and compelling dangers that give rise to ministerial duties on the part of public officers or employees; 3) acts involving medical discretion; and 4) acts that are malicious, willful, and intentional. *See Willow Creek Ranch*, 2000 WI 56, ¶ 25. Lodl v. Progressive Northern Insurance, 2002 WI 71 (S. Ct.).

Plaintiffs contend that both the ministerial duty and present known danger exceptions apply in this case. *Lodl* describes the circumstances which give rise to applying the ministerial duty exception as follows:

¶ 25. The ministerial duty exception is not so much an exception as a recognition that immunity law distinguishes between discretionary and ministerial acts, immunizing the performance of the former but not the latter. *See Kierstyn*, 228 Wis.2d at 91. A ministerial duty is one that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Lister*, 72 Wis.2d at 301.

¶ 26. Put another way, a duty is regarded as ministerial when it has been "`positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.'" *Meyer v. Carmann*, 217 Wis. 329, 332, 73 N.W.2d 514 (1955) (*quoting First Nat'l Bank v. Filer*, 145 So. 204 (Fla. 1933)). If liability is premised upon the negligent performance (or non-performance) of a ministerial duty imposed by law or

> government policy, then immunity will not apply." Lodl v. Progressive Northern Insurance, 2002 WI 71 (S. Ct.).

The plaintiff did succeed in demonstrating that a municipality had a ministerial duty to act to prevent a dog attack in Turner v. Milwaukee, 193 Wis. 2d 412 (Ct. App. 1995). In Turner, a City ordinance provided that a vicious animal that has been involved in two or more previous unprovoked attacks *shall* be removed or destroyed. The dog in Turner had in fact bitten 12 people before it bit the plaintiff, and that fact was known to City authorities. The court's conclusion was based on the mandatory language of the ordinance. Here, plaintiffs do not allege that Manitowoc County had a ministerial duty to prevent the attack based on any statute or ordinance. They do argue, however, that a mandatory duty to act was created when the Sheriff's Department "issued an ultimatum" to Melva Bayard in 1993 that she was to dispose of her animals or they would do it for her. The "ultimatum" is allegedly contained in an August 6, 1993 letter from Lieutenant Richard Thorrington to the DNR. There are a number of problems with the plaintiffs' position.

First, a reading of the documents associated with Lieutenant Thorrington's letter demonstrates that while an investigating officer initially told Bayard she would have to remove two dogs, the Sheriff's Department quickly determined it did not have the authority to enforce such an order and backed

off. Second, there is no indication the order itself involved any of the dogs which attacked Tatum Smaxwell. Third, no promise of action was made to anyone who relied on such a promise. The absence of such a promise distinguishes this case from cases such as Monfils v. Taylor, 165 F. 3rd 511 (7th Cir. 1997), cited by plaintiffs in their brief.

Reported decisions have declined to impose a ministerial duty on municipalities in cases involving more compelling facts than those involved in this case. In Barillari v. Milwaukee, 194 Wis. 2d 247 (S. Ct. 1995) the court concluded that the City of Milwaukee was immune from liability despite the fact police detectives failed to follow through on promises to apprehend a boyfriend who had sexually assaulted and subsequently murdered Shannon Barillari. The court ruled as follows:

> "The dissent argues that 'an officer's promise to send law enforcement officers to an agreed upon place at a specified time to arrest an assailant' (dissenting op. at 264) transforms the subsequent police activity from discretionary acts to ministerial duties. At first blush, this argument appears to have merit. Upon closer examination, however, we conclude that the nature of law enforcement requires moment-to-moment decision making and crisis management which, in turn, requires that the police department have the latitude to decide how to best utilize law enforcement resources. Unlike those professionals who have a set daily calendar they follow, police officers have no such luxury. For these reasons, it is clear that law enforcement officials must retain the discretion to determine, at all times, how best to carry out their responsibilities.
>
> . . . .

> We look to our police departments to enforce our laws and to maintain order in what is becoming an increasingly dangerous society. Routinely, police face critical situations, many of which have the potential for violence. On a typical day, any given law enforcement officer may be arresting and questioning suspects, interviewing and counseling victims, talking to witnesses, rescuing children, and investigating criminal activity. In the course of their work, police must often try to console and reassure people who are distraught and fearful. Faced with escalating violence, they must continuously use their discretion to set priorities and decide how best to handle specific incidents. Police officers must be free to perform their responsibilities, using their experience, training, and good judgment, without also fearing that they or their employer could be held liable for damages from their allegedly negligent discretionary decisions.
>
> Upon examination of the allegations in the Barillaris' complaint against the City, we are not persuaded that the assurances offered by the detectives to be at Shannon's home on July 30, 1987, to arrest Estergard transformed the police department's discretionary actions into ministerial duties. We recognize that Shannon's death at the hands of Estergard was a very tragic event. However, the circuit court properly granted summary judgment in this case. The City is not liable for the discretionary acts of the police department and its officers, acts for which immunity is provided under § 893.80(4), Stats." 194 Wis. 2d at 259-262.

The "promise" made in this case was not to any of the plaintiffs, but to Bayard some six years before the attack. Removal of the dogs she owned then would not necessarily have prevented the attack in this case. Nothing the Sheriff's Department did created a ministerial duty to prevent the attack on Tatum Smaxwell.

Plaintiffs also allege that the County is not entitled to discretionary immunity because the facts in this case fall under

the "known present danger" exception. The Wisconsin Supreme Court recently described application of the known present danger exception in Lodl, *supra*. The court described the test as follows:

> "¶ 39. In this context (*i.e.*, the context of the known danger exception), the ministerial duty arises not by operation of law, regulation or government policy, but by virtue of particularly hazardous circumstances - circumstances that are both known to the municipality or its officers and sufficiently dangerous to require an explicit, non-discretionary municipal response. If liability is premised upon the negligent performance (or non-performance) of a ministerial duty that arises by virtue of a known and compelling danger, then immunity will not apply.
>
> ¶ 40. The cases also demonstrate that not every dangerous situation will give rise to a duty that can be characterized as ministerial for purposes of piercing immunity. A ministerial duty whether imposed by law or arising out of dangerous circumstances is one that is absolute, certain, and imperative. To qualify as ministerial, the time, mode, and occasion for performance of the duty must be so certain that discretion is essentially eliminated. For the known danger exception to apply, the danger must be compelling enough that a self-evident, particularized, and non-discretionary municipal action is required. The focus is on the specific act the public officer or official is alleged to have negligently performed or omitted. Lodl v. Progressive Northern Ins. Co., 2002 WI 71.

An examination of the facts in Lodl is helpful in applying the known danger exception to this case. In Lodl, a storm caused traffic signals at a busy intersection to go out at night. Responding officers opened folded stop signs and called for more police assistance and portable stop signs, but allegedly did not stand in the intersection and perform manual traffic control.

Plaintiff was involved in an accident at the intersection before police backup or portable signs arrived, and sought to hold the municipality liable under the known danger exception for failing to provide manual traffic control immediately. The Supreme Court upheld the trial court's grant of summary judgment to the Town of Pewaukee, reasoning as follows:

> "¶ 46. While the circumstances posed by the uncontrolled intersection were certainly known and dangerous, the situation nonetheless allowed for the exercise of the officer's discretion as to the mode of response. Stated differently, the situation, while dangerous, did not compel a particularized, non-discretionary action on the part of the responding officer. More particularly, Fredericks did not have a ministerial duty to perform manual traffic control.
>
> ¶ 47. The officer could reasonably conclude, in his judgment, that the situation at the intersection was not conducive to manual traffic control by a single officer, or he could choose to address the danger in another way (e.g., portable signs, flares, flashing squad lights). In any event, where, as here, the public officer clearly retained discretionary authority over the nature and mode of his response to the known dangerous situation, the circumstances did not give rise to a duty that can be characterized as ministerial, and the known danger exception to municipal and public officer immunity does not apply. Lodl, *supra*.

In this case, the Sheriff's Department did respond to numerous complaints involving Bayard's dogs over the years and issued numerous citations. There's no indication that the dogs involved in the attack on Tatum, or any of Bayard's other dogs for that matter, had ever engaged in such a vicious attack before. The only record of a Bayard dog biting a person is the

bite of a Sheriff's officer years in 1992, presumably by a different dog. The court cannot say on these facts that the County had a "particularized, non-discretionary" duty to remove the dogs.

Plaintiffs point out that in Turner, *supra*, the court of appeals ruled that the City of Milwaukee not only had a ministerial duty to remove a vicious dog under the mandate of its own ordinance, but that it had a duty to remove the dog under the known danger exception. Turner was decided before Lodl and its continuing authority, at least as it deals with the known danger exception, is in some doubt. More significant are the factual differences between Turner and this case. Within three years before the attack on the plaintiff in Turner, the City had been aware of *12 attacks by the same dog on other people!* There is no allegation that the dogs in this case had actually attacked anyone before. As noted in Lodl, reported "known danger exception" cases "demonstrate the case-by-case nature of the immunity inquiry." Lodl, at ¶38. Although the specific dog attack in this case was unquestionably horrific, the prior historical facts within the possession of the governmental unit in Turner were far more aggravating than what

Manitowoc County knew in this case. Turner does not suggest that the known danger exception should apply in this case.[1]

3. and 4. HERITAGE MOTIONS FOR SUMMARY JUDGMENT.

Because the court is granting Gloria Thompson's motion for summary judgment, Heritage, as Thompson's insurer, is likewise entitled to summary judgment against the plaintiffs, without reaching the coverage issues raised in Heritage's brief. Heritage is also entitled to summary judgment dismissing Humana's cross claim against Heritage, since the plaintiffs have no claim against Heritage which could form the basis of a subrogation claim by Humana.

5. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs move for summary judgment against Humana, arguing that as the administrator of an ERISA plan, Humana is not authorized under §502(a)(3) of ERISA to seek subrogation

[1] Although not argued in any detail by the parties, the court also questions exactly what authority the plaintiffs believe the County should have exercised to remove the dogs which attacked Tatum Smaxwell. Without any evidence these particular dogs had previously injured any other person or animal, it does not appear the County could have proceeded under Wis. Stat. §174.02(3)(a). The court hasn't been cited to any County ordinance authorizing removal of the dogs. Perhaps the County could have commenced a civil action to enjoin a public nuisance, but the court is aware of no authority holding that a municipality ever has had a nondiscretionary duty to commence a public nuisance action.

under its plan for funds paid on the plaintiffs' behalf. Authority for this position, plaintiffs assert, comes from the United States Supreme Court's recent interpretation of the statute in Great-West Life & Annuity Insurance Co. v. Knudson, 112 S. Ct. 708 (2002). In Knudson, the court ruled in a 5-4 decision that an ERISA plan could not bring an action in federal court under §502(a)(3) of ERISA against a plan member not then in possession of proceeds subject to subrogation under the terms of the plan because the claim was legal rather than equitable in nature, and the statute only allowed a claim for "equitable relief" to be asserted in federal court.

As Humana points out in its brief, there are a number of crucial differences between the facts in this case and those in Knudson. First, this case is in state court, not federal court. The court in Knudson specifically ruled: "We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents. . ." Slip Op. p. 15. Justice Ginsberg's dissent laments that "After today, ERISA plans and fiduciaries . . . may seek enforcement of reimbursement provisions like the one here at issue only in state court." Slip Op. pp. 4-5. There is nothing to suggest Knudson is meant to limit the right of a plan administrator to seek subrogation under the plan in state court.

In addition, Humana is seeking not a personal money judgment against the plaintiffs, but the interception of funds which may become due plaintiffs from others. Under the legal-equitable distinction drawn in the Knudson opinion, the relief sought by Humana is equitable in nature and would not be precluded by §502(a)(3).

For these reasons, Knudson does not prevent Humana from pursuing subrogation in this action and plaintiffs' motion for summary judgment dismissing Humana's claim must be denied.

ORDER

Based on the foregoing decision, IT IS ORDERED AS FOLLOWS:

1. The motions for summary judgment of Gloria Thompson, Manitowoc County and Heritage Mutual Insurance Company against the plaintiffs are granted and plaintiffs' claims against Gloria Thompson, Manitowoc County and Heritage Mutual Insurance Company are dismissed.

2. Heritage Mutual Insurance Company's motion for summary judgment against Employers Health Insurance Company, n/k/a Humana is granted and Humana's cross claim against Heritage is dismissed.

3. Plaintiffs' motion for summary judgment against Humana is denied.

4. The cross claims of Gloria Thompson against Melva Bayard and Manitowoc County are dismissed.

5. The cross claim of Heritage Mutual Insurance Company against Melva Bayard is dismissed.

6. The cross claims of Humana against Gloria Thompson, Manitowoc County and Heritage Mutual Insurance Company are dismissed.

Dated this 25th day of October, 2002.

By the court,

Patrick L. Willis
Circuit Judge

g:\plw\decision\smaxwell

SUPREME COURT
STATE OF WISCONSIN

Tatum Smaxwell, a minor, Tanya Smaxwell
and Greg Smaxwell,

Plaintiffs-Appellants-Petitioners,

v. Appeal No. 03-0098

Melva Bayard, Manitowoc County
and Employers Health Insurance Company,

Defendants,

Gloria Thompson and Heritage Mutual
Insurance Company,

Defendants-Respondents.

DEFENDANTS - RESPONDENTS HERITAGE MUTUAL INSURANCE COMPANY AND GLORIA THOMPSON'S RESPONSE BRIEF

On Appeal From The Circuit Court For Manitowoc County,
Case No. 01-CV-246, The Honorable Patrick L. Willis, Presiding

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STATEMENT OF ISSUES

Is a landlord, who is not an owner or keeper of a tenant's dog and who does not exercise control or dominion over the dog, liable on common law negligence grounds for the acts of the dog?

STATEMENT ON ORAL ARGUMENT

Respondents also request oral argument.

STATEMENT OF THE CASE

Greg, Tanya and Tatum Smaxwell filed this petitioned this Court for review following a July 30, 2003 unpublished Court of Appeals decision affirming the dismissal of their negligence claims against Tatum's grandmother, Gloria Thompson, and her insurer, Heritage Mutual Insurance Company. An order accepting the petition was issued on January 23, 2004.

The Smaxwells brought claims after their daughter Tatum sustained significant injuries from three dogs on June 15, 1999 while visiting Ms. Thompson's home. As the Smaxwells' statement of the case indicates, Melva Bayard, the owner and keeper of the dogs, was

also sued by the Smaxwells, but failed to respond to the summons and complaint. Manitowoc County was also named as a defendant.

Ms. Thompson, her insurer and Manitowoc County were dismissed by summary judgment on November 27, 2002. The facts of record were undisputed and were cited in the trial court decision. Those facts are summarized below and are also set forth in the petitioners' brief. Specifically, the trial court ruled that the Supreme Court's decision in Gonzales v. Wilkinson, 68 Wis.2d 154, 227 N.W.2d 907 (1975) and its reaffirmation by the Court of Appeals in Malone v. Fons, 217 Wis.2d 746, 580 N.W.2d 697 (Ct.App.1998) controlled the issue, concluding that a landlord like Ms. Thompson could not be held liable for the actions of a dog owned and kept by her tenant, Melva Bayard.

STATEMENT OF FACTS

Tatum Smaxwell was attacked and bitten by three dogs which were being kept by Ms. Bayard on a parcel of property adjacent to land where her grandmother's home was located. While Ms. Thompson owned this adjacent parcel of land and permitted Bayard to house some of her dogs there, it is undisputed that Ms. Thompson was not the owner of the dogs. The dogs, some of which were wolf-hybrids, had been housed on the adjacent land parcel since the early 1990's.

The June 15, 1999 incident occurred when 3 year-old Tatum and her mother visited Ms. Thompson's home from their apartment (The apartment unit was located on the same parcel of land as Ms. Thompson's home). While the adults were preparing coffee inside the home, Tatum was allowed to play outside under the supervision of her 5-year-old cousin, Nick. Before the adults came outside with their coffee, Nick ran back to the house indicating that "the dogs had gotten Tatum." The adults managed to remove Tatum from the dogs, but injuries had already occurred. It was later determined that the dogs were able to get loose because Ms. Bayard failed to close the kennel latch the night before.

It should be noted that the dogs had a history of "running at large" and that several complaints were filed because of these tendencies. There was also a 1992 report that one of the dogs, a German Shepard, bit an officer of the Sheriff's department who responded to one of the complaints. There was no allegation that the dogs had previously attacked any of the apartment unit residents, Ms. Thompson or other invitees, however.

STANDARD OF REVIEW

The summary judgment standard is well-known. The Supreme Court reviews a lower court's summary judgment decision de novo.

Waters v. United States Fidelity & Guaranty Co., 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). The Court applies the same methodology as the trial court. In re Cherokee Park v. Plat, 113 Wis. 2d. 112, 115-116, 334 N.W.2d 580-583 (Ct. App. 1983); Grams v. Boss, 97 Wis. 2d. 332, 338, 294 N.W.2d 473, 476-477 (1980). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M&I First National Bank v. Episcopal Homes Management, Inc., 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). Here, there is no issue of fact, nor does the question seem to be whether the lower courts misapplied the law as it existed. The question is whether Gonzales' holding that a landlord is not liable under common law negligence for injuries caused by a tenant's dog, is a valid statement of the law.

ARGUMENT

The Smaxwells present two arguments. First, they assert that a jury could conclude that Ms. Thompson was negligent for allowing her tenant to keep dogs on her property and, therefore, the Supreme Court should undertake the effort to change the law as it exists under Gonzales. They argue that Alvarado v. Sersch, 2003 WI 55, 662 N.W.2d 350, 262 Wis.2d 74 provides new insight and changes how

Wisconsin approaches the preclusion of liability, limiting it to instances where immunity exists for public policy reasons. Second, the plaintiffs argue that the Gonzales decision does not actually provide a landlord relief from liability for the acts of a tenant's animal, and if it does, the Supreme Court's decision in Pagelsdorf v. Safeco Ins. Co., 91 Wis.2d 734, 284 N.W.2d 55 (1979) has implicitly overruled Gonzales and Malone.

The Supreme Court has long recognized a general duty of ordinary care by all dating back to its decision in Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956). Obviously, this was the law well before Alvarado. It was also the law when the Gonzales and Malone decisions were rendered. The fact that this Court has, since Klassa, reached a conclusion relieving a landlord from liability for a tenant's dogs is significant. It is also significant that the legislature has made the apparent choice to take no action to reverse Gonzales or the cases that followed.

I. As A Landlord Without Control Or Dominion Over Her Tenant's Dogs, Gloria Thompson Did Not Have A Duty To Avoid Exposing Persons On Her Property To A Risk They Might Create.

The Smaxwells point to Wis. JI-Civil 8020 to attempt to expand

the liability of landlords to include responsibility for their tenant's dogs. This is misplaced. Wisconsin case law and Wis. JI-Civil 1391 have created an exception to Wis. JI-Civil 8020, which provides immunity to landlords for the actions of their tenant's dogs. Moreover, Wis. JI-Civil 8020 deals with conditions, not the existence of domestic animal.

Wis. JI-Civil 1391 sets forth that an owner/keeper of an animal must use ordinary care to restrain and control the animal so that it will not cause injury or damage to a person or property. A person is said to be a keeper of an animal if "even though not owning the animal, the person has possession and control of it or if the person permits another who is a member of his family or household to maintain the animal on his or her premises." Wis. JI-Civil 1391. In this case, it is clear that the owner/keeper of the dogs was Melva Bayard, not Gloria Thompson. Ms. Bayard was not a member of Ms. Thompson's family or household.

This exception to liability was set forth in Gonzales v. Wilkinson, which involved very similar facts. There, a 1-1/2 year old child went onto a neighbor's property where he was allegedly attacked and bitten on the head by a Basset Hound. The plaintiffs filed claims against the owner of the duplex (Wilkinson) and the tenant/owner of the dog (Prueher). The defendant-duplex owner filed a motion to dismiss

which the trial court rejected. The Supreme Court reversed the trial court, noting an important distinction for the landlord:

> "In examining the complaint, we find no allegation that James Wilkinson was either the owner or the keeper of the dog, nor is it alleged that he in any way had any dominion over the dog. There is an allegation that he knew his tenant, Ray Prueher, maintained a vicious dog on the premises, but the law does not require him, as the owner of the building, to be an insurer for the acts of his tenant. Under the allegations of this complaint, we hold that the ownership and control over the premises created **no duty** on the part of the owner of the premises to the plaintiffs." Gonzales, at 158. (Emphasis added).

The Court of Appeals followed the Supreme Court's interpretation in Malone v. Fons, supra. In Malone, the 8-year old plaintiff, Sarah Malone, was bitten by a Rottweiler belonging to Barbara Garner. Garner rented a single family home from Joseph Fons. There were allegations that the dog had previously broken free of his leash, run across the street and placed his jaws around the arm of another young child. For purposes of summary judgment, these allegations were accepted as true by the trial court. There were also allegations that this former incident was told to Fons by the first young victim's father. The Court of Appeals found that Fons was not liable, as a

matter of law, under either a common-law negligence claim or a statutory claim based on Wis. Stat. § 174.02(1).

While the allegations in Malone were even more extensive than those being made against Gloria Thompson in this case, the critical fact was that the landlord was neither the owner nor the keeper of the dog. The Malone court explained:

> "Thus, it would appear that *Gonzales* simply extends the common law rule to a landlord-tenant situation. A landlord is normally neither an owner nor a keeper of his or her tenant's dogs, nor does a landlord usually exercise any control over those dogs. Hence, a landlord is not liable under the common law for any injuries caused by a tenant's dog. Therefore, we conclude that, according to the plain language of *Gonzales*, Fons is not liable on common-law negligence grounds for the dog bite inflicted upon Sarah by his tenant's dog. Malone, supra, at 757.

Ms. Thompson, who held the same role simply as the owner of property, should not be treated differently here. She is not and should not be an insurer for the acts of her tenant, Melva Bayard.

It should be noted that Antoniewicz v. Reszcynski, 70 Wis.2d 836, 854-55, 236 N.W.2d 1, 10 (Dec. 1975) and Pagelsdorf v. Safeco Ins., supra, do not represent the "dramatic change" in the law, that the Smaxwells assert. Although Antoniewicz and Pagelsdorf may have clarified that different duties in the maintenance of a premises do not

exist for a landowner for invitees versus licensees, the decisions really do not change what had been and still is the law in Wisconsin, i.e., that there is a general duty of ordinary care owed by all, including landowners. After all, in Malone v. Fons, the Court of Appeals considered and rejected an identical argument by the appellant that Pagelsdorf overruled Gonzales' holding. The Court of Appeals specifically concluded that Pagelsdorf was limited to the issue of a defective premises as to rental property and did not overturn Gonzales. The Malone court determined that there was no authority to suggest that a tenant's dog should be considered a "defect" or that a landlord's act of permitting a tenant to own a dog should be equated with a landlord's failure to repair a defect or to properly maintain the premises. Plainly put, a premises liability case like Pagelsdorf, which merely recognized a landowners' long-standing responsibility for defects in his own rental property, does not further this analysis, nor does it address the exception created for a tenant's dogs.

The liability the Smaxwells suggest cannot be imposed without a willingness to impose a standard of omniscience upon a landlord like Ms. Thompson. This is exactly why a landlord should be insulated from liability for a tenant's dogs.

II. The Patterman Decision Does Not Create A Conflict With Gonzales and Malone , Nor Does It Justify A Public Policy Directive By The Supreme Court To Impose Liability Upon A Landlord For Negligence Associated With A Tenant's Dog.

Despite the fact that no liability was found in the case, the Smaxwells contend that dicta from the Court of Appeals' decision of Patterman v. Patterman, 173 Wis.2d 143, 496 N.W.2d 613 (Ct.App.1992) supports the proposition that a landlord may be liable for negligence associated with a known dangerous dog allowed on her premises. They appear to overlook footnote 5 from the decision, which states:

> "Erin's theory assumes it is sufficient to prove either generally that the chow as a breed is dangerous or that the particular dog had evinced a vicious propensity. Because we conclude that she has proven neither, we will assume without deciding that Erin correctly states the law."

Thus, the court merely assumed, **without deciding**, that the plaintiff correctly cited the law and never reached the issue of whether a landlord could be negligent for allowing a known dangerous dog on the premises. Also, even if a more thorough review of the Michigan court of appeals' case of Klimek v. Drzewieski, 352 N.W.2d 361 (Mich. App. 1984) had been conducted, it is doubtful that the Patterman court would have reached the same conclusion in light of Gonzales,

especially since it was willing to adopt Gonzales just six years later. Patterman is limited to its facts and does not provide anything persuasive to this analysis. The issue is not whether a landowner can be held responsible for a dog running at large on or near his property. Inherent in such a circumstance is the fact that the dog is not otherwise subject to another's control or dominion. The issue is whether the landlord has responsibility for such a dog when it is controlled by another who is a tenant. Gonzales and Malone sufficiently address the issue and should be upheld with this Court's decision.

III. Gonzales' Determination That Public Policy Precludes The Liability Of A Landlord For A Tenant's Dog Should Not Be Modified By The Courts.

The Supreme Court has had an opportunity in recent years to re-examine the Gonzales decision. It declined a specific invitation by the Court of Appeals in Malone.decision.[1] Since then, it has also had the opportunity to, but chose not to, review a decision by the Court of

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[1] The Malone decision indicated that Patterman could not be read to allow common-law negligence claims against landlords for injuries caused by dangerous dogs on their premises because such a holding would expressly conflict with the supreme court's prior holding in Gonzales. Despite this statement and recent invitation for review, the petition for review of this decision was denied. Malone v. Fons, 219 Wis.2d 922, 584 N.W.2d 123 (1998).

Appeals which affirmed a trial court's determination that public policy precluded liability for a dog owner. See Alwin v. State Farm Fire and Casualty Co., 2000 WI App 92, 610 N.W.2d 218, 234 Wis.2d 441, review denied May 23, 2000, 616 N.W.2d 115. Instead of being overturned as outdated or too harsh, Gonzales and its public policy determination limiting liability to a dog's owner or keeper has continued to be cited to preclude liability for a landlord who does not own or keep a tenant's dog.

In Alwin v. State Farm Fire and Casualty Co., a guest at the home of a dog's owner was injured after the dog fell asleep behind her chair, causing the guest to trip. Although the issue of liability under Wis. Stat. § 174.02(1) was being addressed, the Court of Appeals, citing Becker v. State Farm Mut. Auto. Ins. Co., 141 Wis.2d 804, 416 N.W.2d 906 (Ct.App.1987), employed a public policy analysis to limit liability for the dog owner. The appellate court ultimately determined that liability should be precluded based upon public policy, carving out an exception to liability under the statute, similar to the exception created by Gonzales.

In Rockweit v. Senecal, 197 Wis.2d 409, 541 N.W.2d 742 (1995), the Supreme Court again had the opportunity to consider whether public policy should preclude liability for common-law

negligence, in a case involving a campfire. While the Rockweit decision was obviously not one involving a dog, the public policy analysis in that case is instructive. In Rockweit, a friend visited the Rockweit family's campsite and was the last one to retire for the evening. She did not extinguish the campfire before returning to her own site, sometime after which Mary Rockweit and her son Anthony awoke. As they walked across the campsite, Anthony slid into the fire pit and was severely injured.

The Supreme Court upheld the trial court's directed verdict in favor of the family friend after a reversal by the Court of Appeals. In reaching the conclusion that common-law liability should be precluded, the Rockweit Court conducted a public policy analysis identical to that which would be used in determining liability associated with a dog. The Court concluded that the friend did not create the hazardous situation (the fire pit), nor did she maintain it, nor did she provide for its continued existence. Under these circumstances and despite her general duty of ordinary care, the Court determined that the imposition of liability would place an unreasonable burden upon a guest in her position which would enter a field with no sensible or just stopping point. The Court therefore concluded that the responsibility for maintaining the safe existence of the fire pit properly remained with the

possessor. "Allowance of recovery under these facts would essentially require a guest to remedy any allegedly unsafe condition over which he or she has exercised no control, and did not create, or risk being saddled with unforseen financial responsibility." Rockweit at 427, 750.

In addition to the various examples of the Supreme Court recognizing public policy exceptions to liability, its decision in Scott v. Savers Prop. & Cas. Ins. Co., 2003 WI 60, is also significant. There, the majority rejected an invitation to revisit decades of precedent relating to government immunity, recognizing the doctrine of *stare decisis* and the role of the legislature. The same result should follow here. The Court should not overrule decades of precedent after the legislature has shown its approval of the Court's interpretation of the law.

The Gonzales and Malone courts have already determined, the public policy factors in the case of a tenant's dog should also result in non-liability for the landlord. Like the family friend in Rockweit, Ms. Thompson did not create any danger associated with the dogs. Even though she may have owned the property and allowed the dogs to be kept by her tenant, it was Melva Bayard who failed to close the kennel latch. Ms. Thompson did not maintain the kennel, nor did she provide for the dogs in any way. She was not the owner or keeper of the

animals and essentially had no way to control them or exercise dominion over them. As someone who is not the "owner" or "keeper" of the dogs, her liability as the landlord is appropriately limited under the current state of the law. If a change is necessary, it is best left to the legislative branch of our state's government. The legislature is best-equipped to determine whether to impose any liability upon Gloria Thompson. It is also better equipped to decide whether to charge landlords with the role of an omniscient and whether to make them "insurers" for their tenants.

CONCLUSION

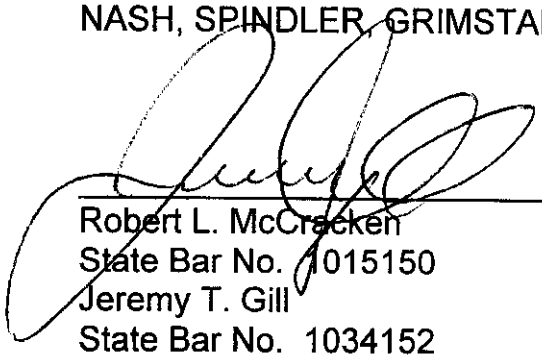
The facts presented in Gonzales and Malone are virtually identical to those presented by this case. The same public policy considerations which precluded liability in those cases, rightfully preclude liability in this case. Despite the Smaxwells's assertion, nothing material has changed since Gonzales. The same duty of ordinary care by all, to all, existed at the time of its holding. The distinction between an "invitee" and a "licensee" does not warrant a full scale revision of an exception to liability that has existed for decades and has been approved by the Legislature's inaction. If a change is to be made, the respondents respectfully submit that the Legislature is best-equipped to do so. The ramifications for the rental business, the

insurance industry and possibly even dog owners in general are at stake, as questions like, "where do we draw the line for the landlord's responsibility" or "what should an insurer require for dog-friendly landlord" or "can a landlord extinguish a dog's life if it poses a risk" are inherent to the analysis and are best addressed by our local representatives.

For the reasons set forth above, the decision of the lower courts should be affirmed.

Respectfully submitted this 11th day of March, 2003,

NASH, SPINDLER, GRIMSTAD & McCRACKEN LLP



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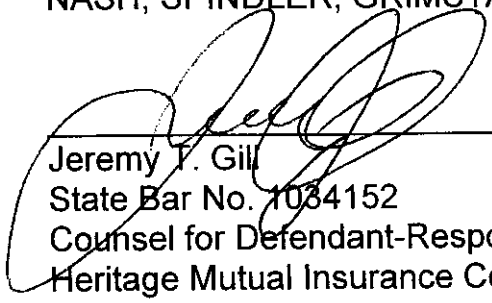
CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this response brief conforms to the rules contained in §809.19(8)(b) and 809.62(4) for a response brief produced with a proportional serif font. The length of this brief is 3,485 words.

Dated this 11th day of March, 2004.

NASH, SPINDLER, GRIMSTAD & McCRACKEN LLP



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SUPREME COURT OF WISCONSIN

Tatum Smaxwell, a minor, Tanya Smaxwell and
Greg Smaxwell,
Plaintiffs-Appellants-Petitioners,

v. Appeal No. 03-0098

Melva Bayard, Manitowoc County and
Employers Health Insurance Company,
Defendants,
Gloria Thompson and Heritage Mutual
Insurance Company,
Defendants-Respondents.

PETITIONER'S REPLY BRIEF

On appeal from the Circuit Court for Manitowoc County
Case No. 01-CV-246
The Honorable Patrick L. Willis, presiding

Submitted by:
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ARGUMENT

I. Allowing a Jury to Hear the Smaxwells' Negligence Claims Would Neither Impose Liability on Thompson Nor Make Her an Insurer for the Acts of Her Tenant.

Thompson and her insurer repeatedly argue that the Smaxwells are seeking to "impose liability" on Thompson and make her an insurer for the acts of her tenant. This is a major overstatement to say the least and it ignores the distinctions between the concepts of negligence and liability, as well as the role of the jury in negligence cases.

The Smaxwells have not alleged that Thompson was strictly liable in this case nor have they ever asked any court to impose liability on Thompson as a matter of law. The Smaxwells were the non-moving party on the motions for summary judgment and the basis for their appeal has always simply been that their negligence claims should not have been taken from the jury as in most cases.

Allowing the Smaxwells' negligence claims to go to the jury would obviously not impose any liability on Thompson as a matter of law. The jury would need to decide whether Thompson was negligent based upon all of the evidence presented at trial. Further, even if a jury does find that Thompson was negligent, her ultimate liability would be determined in accordance with Wis. Stat. § 895.045 and contributory negligence principles.

No legislative change is necessary to allow the Smaxwells' claims to proceed in this case. While Wis. Stat. § 174.02 clearly requires ownership or control over the dog to trigger strict responsibility, no language in the statute prohibits negligence claims against others. Yet a rule of immunity has been applied by the lower courts simply because § 174.02 doesn't apply to Thompson.

Just as this is not a strict liability case, there should be no immunity for Thompson's negligence. Such a holding would not make Thompson an insurer for the acts of her tenant but would merely allow the jury to decide whether Thompson, as landowner, satisfied her duty to her guest under the circumstances.

II. The Cases Cited by Thompson Do Not Support a Public Policy Exception to Liability in the Present Case.

Pursuant to Alvarado v. Sersch, 2003 WI 55, 662 N.W.2d 350, 262 Wis. 2d 74, negligence cases should go to the jury before the trial court considers whether to limit liability on public policy grounds, and liability should be precluded as a matter of law only in extremely rare cases. The three main cases cited by Thompson to support liability preclusion on public policy grounds in the present case are either distinguishable or actually support the Smaxwells' claims.

Alwin v. State Farm Fire and Casualty Co., 2000 WI App. 92, 610

N.W.2d 218, 234 Wis. 2d 441, was not a negligence case. Alwin raised the issue of whether strict liability under Wis. Stat. § 174.02 applied to a dog owner when a guest tripped and fell over a sleeping dog. There were no allegations of negligence against the dog owner in Alwin nor any evidence of any act of aggression or act by the dog whatsoever other than sleeping. The Smaxwells' claims are for negligence, not strict liability, and the trial court was basically willing to assume that Thompson was negligent. Thus, the present case and Alwin are distinguishable on both the facts and legal theories asserted.

The only similarity between the present case and Scott v. Savers Prop. and Cas. Ins. Co., 2003 WI 60, is that to this point the Smaxwells, like the plaintiff in Scott, have not been allowed to present their tort claims to a jury because of apparent precedent establishing immunity. The basis for immunity in Scott was the well known "discretionary immunity" exception pursuant to Wis. Stat. § 893.80, and there is no similar statute in the present case. As explained above, Wis. Stat. § 174.02, commonly referred to in error as "the dog bite statute,"creates strict liability for dog owners but doesn't require immunity in all other situations where that statute does not apply.

If anything, Rockweit v. Senecal, 197 Wis. 2d 409, 541 N.W.2d 742 (1995), supports the Smaxwells' claims. Rockweit involved claims on

behalf of a young boy who was injured when he fell into a fire pit at a campground. One of the claims was against an adult guest at the campsite who was apparently the last person to leave the fire and failed to extinguish it. According to the Supreme Court in Rockweit, it was clear from the record that the defendant never exercised custody or control over the child who was injured and that her only connection with the fire pit was to sit beside it playing cards and socializing with the child's family. The defendant in Rockweit did not create the hazard and at no time did she assume any responsibility to maintain the fire pit. Thompson acknowledges the following as the basis for denying liability in Rockweit: "allowance of recovery under these facts would essentially require a **guest** to remedy any allegedly unsafe condition over which he or she has exercised no control, and did not create, or risk being saddled with unforeseen financial responsibility." Rockweit at 427, 750 (emphasis added). Thompson goes on to argue that like the guest in Rockweit, she did not create any danger in the present case and she "essentially had no way to control" the dogs.

Unlike the defendant in Rockweit, Thompson was not a guest and as owner of the property she had a great deal of control and authority to prevent dangerous dogs from injuring guests on her property. While the Smaxwells completely agree that Thompson didn't actually do anything to exercise control or dominion over the dogs, these facts are the very basis for

the Smaxwells' negligence claims. Simply put, Thompson as land owner had a much greater duty in the present case than the guest in Rockweit and if the public policy factors from Rockweit have any relevance in the present case, they support liability against Thompson.

In summary, the public policy considerations from these cases do not compel a finding of non-liability in the present case and any consideration of such factors should be withheld until the issue of negligence has been decided by the jury.

CONCLUSION

For the reasons stated above and in their original Brief, the Smaxwells respectfully request that the Supreme Court reverse the Trial Court and Court of Appeals and remand the case for trial on their negligence claims against Gloria Thompson and her insurer.

Dated this 22nd day of March, 2004.

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CERTIFICATION

I certify that this Brief conforms to the rules using the following font: Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point text in Times New Roman font. The length of this brief 1247 is words.

Dated this 22nd day of March, 2004.

Jordan P. Blad